Supreme Court of New Jersey

C-863 September Term 2009
65,803

COMMITTEE TO RECALL ROBERT MENENDEZ FROM THE OFFICE OF U.S. SENATOR,

Plaintiff-Respondent,

vs.

NINA MITCHELL WELLS, ESQ., SECRETARY OF STATE, and ROBERT F. GILES, DIRECTOR OF THE DIVISION OF ELECTIONS,

Defendants-Respondents,

and

UNITED STATES SENATOR ROBERT MENENDEZ,

Indispensable Party-Petitioner.

CIVIL ACTION

ON PETITION FOR CERTIFICATION FOR REVIEW OF FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

DOCKET NO. A-2254-09T1

ENTERED: MARCH 16, 2010

Sat Below:

HON. EDWIN H. STERN, P.J.A.D.
HON. RONALD B. GRAVES,
HON. JACK M. SABATINO,
JJ.A.D.

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Conservative Legal Defense and Education Fund

Institute on the Constitution

U.S. Justice Foundation

Gun Owners Foundation

Gun Owners of America, Inc.

Vision to America

The Lincoln Institute for Research and Education

Public Advocate of the United States, Inc.

U.S. Border Control

U.S. Border Control Foundation

American Coalition for Competitive Trade

The Constitution Party National Committee

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INTEREST OF THE AMICI CURIAE

This amicus curiae brief is submitted on behalf of a group of 12 organizations involved with public education on important issues, recognize that this case is of importance to the people of New Jersey as it relates to their ability to recall a U.S. Senator elected from their state who they believe to be making decisions which do not reflect their best interests. Furthermore, this case is of interest to the entire country, and the decision herein could have an impact on whether other states permit their citizens to recall their Senators. It is a case involving the correct interpretation of the U.S. Constitution, and presents an issue of vital importance to America.

Conservative Legal Defense and Education Fund ("CLDEF") (www.cldef.org) was incorporated in the District of Columbia and is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC").

Institute on the Constitution (www.iotconline.com) is an educational effort sponsored by the Law Office of Peroutka and Peroutka of Pasadena, Maryland.

U.S. Justice Foundation (http://usjf.net/) was incorporated in California, and is exempt from federal income tax under IRC section 501(c)(3).

Gun Owners Foundation ("GOF") (www.gunowners.com) was incorporated in Virginia and is exempt from federal income tax under IRC section 501(c)(3).

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Vision to America is a Division of Christian Worldview Communications, LLC, dedicated to promoting conservative values and restoring our Founding Fathers' vision for America as a Christian republic.

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U.S. Border Control ("USBC") (www.usbc.org) was incorporated in Virginia and is exempt from federal income tax under IRC section 501(c)(4).

U.S. Border Control Foundation ("USBCF") (www.usbcf.org) was incorporated in Virginia and is exempt from federal income tax under IRC section 501(c)(3).

American Coalition for Competitive Trade (www.aftd.org) was incorporated in Virginia and is exempt from federal income tax under IRC section 501(c)(3).

The **Constitution Party National Committee** (www.cp.org) was incorporated in Virginia and is a national political party committee registered with the Federal Election Commission.

STATEMENT OF THE CASE

On November 2, 1993, by the overwhelming margin of 76.2 percent to 23.8 percent, with over 1.3 million votes cast, the people of New Jersey added to Article I, Paragraph 2 of the New Jersey State Constitution the following provision:

> The people reserve unto themselves the **power to recall**, after at least one year of service, **any elected official** in this state or **representing this state in the United States Congress.** [Emphasis added.]

Included in this amendment was the constitutional mandate that the state legislature "enact such laws to provide for such recall elections." *Id.* Pursuant thereto, on May 17, 1995, the New Jersey legislature enacted the Uniform Recall Election Law ("UREL"), N.J. S.A. 19:27A-1 *et seq.*

In accordance with this statute, on September 25, 2009, the Committee to Recall Robert Menendez from the Office of U.S. Senator ("Committee") filed a Notice of Intention to Recall with the New Jersey Secretary of State. On January 11, 2010, the Secretary refused to certify the recall effort as required by statute, on the ground that, insofar as they might apply to the recall of a United States Senator, the recall provisions in the state constitution and UREL violated the United States Constitution.

Seeking judicial relief, the Committee filed an appeal from the Secretary's denial to the New Jersey Superior Court Appellate

Division. On March 16, 2010, without ruling on the merits of the Secretary of State's constitutional position, the court ordered the Secretary to accept and file the Committee's Notice of Intention to Recall. *See* Committee v. Wells, Docket No. A-2254-09T1. On April 5, 2010, Senator Menendez, in his capacity as an indispensable party to the case in Superior Court, filed his Petition for Certification in this Court. On April 27, 2010, the petition was granted, with briefs to be filed by all parties and amici by May 10, 2010, and oral argument scheduled for May 25, 2010.

SUMMARY OF ARGUMENT

The power to recall senators is reserved to the people by the Tenth and Seventeenth Amendments of the U.S. Constitution. New Jersey's recall law is not otherwise prohibited by Article I, sections 3, 4, or 5, or by the Seventeenth Amendment of the U.S. Constitution. Nor is New Jersey's recall law foreclosed by the U.S. Supreme Court decision in U.S. Term Limits v. Thornton.

ARGUMENT

I. THE POWER TO RECALL A UNITED STATES SENATOR IS A POWER RESERVED TO THE PEOPLE BY THE TENTH AND SEVENTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In his Petition for Certification, Senator Menendez argued that the "Secretary of State correctly refused to accept the [Respondents' recall] petition because 'the **qualifications** and **election** of a Member of the United States Senate is a matter of **exclusive jurisdiction of federal authority**....'" Petition for Certification and Appendix on Behalf of Petitioner United States Senator Robert Menendez. "Menendez Pet." p. 2 (emphasis added). While the "qualifications" for senatorial office are set by Article I, Section 3, Clause 3 of the United States Constitution[1] and are, therefore, within the "exclusive jurisdiction of federal authority" — the mode of "election" of members of the Senate has never been vested in any "federal authority." Rather, until the ratification of the Seventeenth Amendment in 1913, the "election" of members of the Senate was "reserved" to the States respectively, and after 1913, "reserved" to the people of the several States — not delegated to the United States as the New Jersey Secretary of State and Menendez have presumed. Having not

[1] *See* Powell v. McCormick, 395 U.S. 486, 550 (1969). *See also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 827 (1995).

been delegated, the power of election of members of the United States Senate remains, under the Tenth Amendment, with the States and the people.

A. The Power to Elect Persons to the United States Senate Is Not a Power Delegated to the United States by the United States Constitution, but Is a Power Reserved to the Several States.

The United States government is a government of "limited and enumerated powers...." 2 J. Story, Commentaries on the Constitution ("Story's Commentaries"), § 1907, p. 652 (5th ed., Little, Brown: 1891). Thus, the Tenth Amendment to the United States Constitution provides that "[t]he powers **not** delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." As Justice Story observed:

> [W]hat is not conferred is withheld, and belongs to the State authorities if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty. [Story's Commentaries, at § 1907, p. 652 (caps original).]

At the constitutional convention, members of the Virginia delegation proposed an initial resolution whereby "the members of the second branch of the National Legislature [the Senate] ought to be elected by those of the first [the House of Representatives]." "Records of the Federal Convention" reprinted in 2 P. Kurland & R. Lerner, The Founders' Constitution (Univ.

Chicago Press: 1987)("The Founders' Constitution"), Item 3, p. 183. As Justice Story later recounted, the Virginia resolution delegating such elective power to the House "met ... with no decided support, and was negatived, no State voting in its favor, nine voting against it, and one being divided." 1 Story's Commentaries, § 703, p. 522. Similarly dismissed was the suggestion that the members of the Senate be appointed by "the National Executive," a suggestion summarily dismissed by Elbridge Gerry of Massachusetts as a "stride towards monarchy that few will think of." "Records of the Federal Convention," 2 The Founders' Constitution, p. 186.

Instead, the convention overwhelmingly chose to expressly reserve the power to select members of the Senate to the several States — to be exercised by the legislatures of those States. *Id.*, pp. 186-87. By vesting this power in the several states, the People of the United States sought, among other things, to "secur[e] the national government from undue encroachments on the powers of the States." 1 Story's Commentaries, § 704, p. 522. As James Madison put it, by lodging the power of election of the Senate in the several State legislatures, the proponents of the United States Constitution hoped that the Senate would be disposed to influence by the interests of the several States rather than to be "overbearing towards them." J. Madison,

Federalist No. 45, p. 240 (G. Carey & J. McClellan, eds., Liberty Fund, Indianapolis: 2001).

B. The Seventeenth Amendment Restored to the People of the Several States their Inherent Power to Direct Election of the United States Senators Representing Their Respective States.

Until the ratification of the Seventeenth Amendment in 1913, the power to elect members of the United States Senate remained in the legislatures of the several States. The campaign for ratification of the Seventeenth Amendment originated with the Progressive movement that took place in the last decade of the 19th Century, and first two decades of the 20th Century. *See generally* 2 S. Morison & H. Commager, The Growth of the American Republic ("The American Republic"), pp. 354-84 (Oxford Univ. Press: 1937). See also R. Rossum, Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy (Lexington Books: 2001) ("Federalism and the Seventeenth Amendment"), pp. 181-83, 191. Among other reforms "directed toward a broader democracy," the American progressives "agitat[ed] for ... the direct election of Senators." 2 Morrison & Commager, The American Republic, pp. 379-80. Indeed, the "popular selection of U.S. senators" was part of a concerted effort to "promote[] a system of 'direct democracy' through such measures as primary elections, ... lawmaking by initiative and

referendum, provisions for recall, and a variety of other reforms" designed "explicitly to reinvigorate and restore popular control of government and the Constitution." L. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review ("The People Themselves"), p. 215 (Oxford Univ. Press: 2004).

Thus, the Seventeenth Amendment divested the legislatures of the several States of the power to elect the members of the Senate, and expressly vested that power in the people of the several States. The immediate goal of the amendment was to make the senators "more ... accountable to the people" (*id.*), and thus, more consistent with the founding principle of the nation's charter that "governments are instituted among men, deriving their just powers from the consent of the governed." Declaration of Independence. Pursuant to this principle, it is the people, not their governors, who determine if their "Form of Government" is working "to effect their Safety and Happiness," (id.) and to make whatever alterations that the people see fit for the government to achieve those ends. Declaration of Independence. *See* Kramer, The People Themselves, pp. 52-57. Inherent in the right of the people to establish their form of government is the power to select those civil officials who are to serve them. *See, e.g.*, The Revolutionary Writings of John Adams, pp. 54-56 (Liberty Fund, Indianapolis: 2000). By ratification of the

Seventeenth Amendment, the people reclaimed from the state legislatures the power to select each state's two senators, and returned that power to the People.

C. The Power of the People to Elect a United States Senator Includes the Power to Recall that Senator before the End of the Six-Year Term for which He Was Elected.

As Article I, Paragraph 2 of the 1844 New Jersey Constitution affirms, "[a]ll political power is inherent in the people." Thus, as the same paragraph also affirms, "Government is instituted for the protection, security, and benefit of the people, and they have a right **at all times to alter or reform the same, whenever the public good may require it.**" (Emphasis added.) Significantly, the New Jersey recall provision enacted by the 1993 amendment was made a part of this paragraph, indicating that the recall provision was a deliberate exercise of the people's inherent powers to constitute their government according to their — not their government officials' — view of the public good.

Prior to the Seventeenth Amendment, it was widely assumed that the delegation of the power to elect members of the Senate to the several State legislatures did not include the power to recall, there being no express delegation of such a power to the state legislatures. *See* Rossum, Federalism and the Seventeenth

Amendment, pp. 100-01. *See also* "Debate in the New York Ratifying Convention," Item 14, 2 The Founders' Constitution, p. 221. In national debate and in several state constitutional conventions, opponents of the proposed constitution decried the absence of recall power in the state legislatures. *See, e.g.,* L. Martin, "Genuine Information," Item 9, 2 The Founders' Constitution, p. 214; Debate in Massachusetts Ratifying Convention, Item 10, 2 The Founders' Constitution, p. 214. In response, proponents contended that state legislatures would have other means to check "their delegates" to the Senate, *e.g.*, "public instructions." Mass. Convention, 2 The Founders' Constitution, p. 214. Others argued that vesting any power in the state legislatures that would shorten a senator's six-year term would impair one of the main purposes of the Senate — to serve as a check on "the people against their own temporary errors and delusions." *See, e.g.,* J. Madison, *Federalist No. 63*, p. 327.

In the debate over a resolution to confer upon the state legislatures the power to recall their senators, one delegate to the New York state ratifying convention wondered whether it was a mistake to have delegated to the several state legislatures the power to elect members of the Senate:

> The people are the best judges who ought to represent them. To dictate and control them, to tell them who they shall not elect, is to abridge their natural rights. [Debate in New York Ratifying Convention, 2 The Founders' Constitution, p. 223.]

Not until 123 years later was this delegate's vision realized with the ratification of the Seventeenth Amendment, demonstrating — in the words of the 1912 Progressive Party Platform — "'that the people are the masters of their Constitution,' and that '[i]n accordance with the needs of each generation the people must use their sovereign power to establish and maintain' the ends of republican government."[2] L. Kramer, The People Themselves, p. 215.

On November 2, 1993, the people of the State of New Jersey did just that. By over 75 percent of votes cast, they amended their constitution to provide for the recall of any of its elected officials, including those "representing this state in the United States Congress," investing their state authorities with the power to implement their will by appropriate legislation. As Justice Story explained, under the Tenth

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[2] In his book on federalism and the Seventeenth Amendment, Professor Ralph Rossum makes a compelling case that the Seventeenth Amendment fundamentally changed the nation's original republican form of government, depriving state legislatures of their structural check on laws which expand federal government power beyond those enumerated in the Constitution. See Rossum, Federalism and the Seventeenth Amendment, pp. 157-73, 219-20.

Amendment "what is not conferred" on the United States government, is "withheld," and belongs to the "State authorities if invested by their constitutions of government respectively in them." 2 J. Story's Commentaries § 1907, p. 652. Thus, 80 years after the Progressive Movement — which had called for a change in the election of the U.S. Senate to be more democratic,[3] the people of New Jersey decided to add the power of recall to their political arsenal. In doing so, the people were simply exercising their inherent sovereign powers, as America's first president George Washington acknowledged:

> "The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own chusing; and whenever it is executed contrary to Their interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, **recalled**." [Letter from George Washington to Bushrod Washington (Nov. 10, 1787) quoted in Kramer, The People Themselves, p. 85 (emphasis added).]

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[3] See Rossum, Federalism and The Seventeenth Amendment, pp. 181, 191. Some of today's self-described "progressives" apparently believe that lodging power in the people to recall their elected representatives is a tad too much citizen involvement in government. Senator Menendez seeks to deny to the people the power to recall a member of the Senate, as it was when the state legislatures had the power to elect the Senate, but he cannot selectively turn back the clock to save himself from a politically-aroused populace.

II. THE RETURN TO THE PEOPLE OF THE SEVERAL STATES THE POWER TO ELECT AND RECALL THEIR U.S. SENATORS IS NOT PROHIBITED BY THE U.S. CONSTITUTION.

In his Petition for Certification, Senator Menendez has argued that the "Secretary of State correctly refused to accept the petition because ... 'neither the United States Constitution nor federal statute provide for a recall proceeding for a federally-elected official.'" Menendez Pet., p. 2. Because the power of election of members of the Senate has never been "delegated" by the Constitution to any federal authority, the question is **not** whether the U.S. Constitution or any federal statute "provides" for recalling a duly elected member of the United States Senate. Rather, the question is — as stated in the Tenth Amendment — whether such a recall is "prohibited" by the Constitution. As demonstrated *infra*, it is not.

A. The Power of Recall Is Not Precluded by the Seventeenth Amendment's Provision that a Senator "shall be elected ... for six years."

Senator Menendez has argued that both the Constitution's original Article I, Section 3, and the Seventeenth Amendment "establish that the term of a Senator **shall be 'six years**.'" Menendez Pet., p. 8, 12 (emphasis added). From this proposition, the Senator asserts that he cannot be recalled from office since he is entitled to serve his entire six-year term unless he either dies "'or by some direct action on the part of the Senate in the

exercise of its constitutional powers,'" is removed. *Id.*, pp. 10-11. Notably absent from his claim of entitlement is any reference to the relevant constitutional texts.

To be sure, both Article I, Section 3, Clause 1 and the Seventeenth Amendment state that members of the Senate are "chosen" or "elected" "for six years." From the beginning, however, this never meant that each member of the original senate, and thereafter, would be chosen to serve a literal six-year term. Rather, Article I, Section 3, Clause 2 called for the division of newly-chosen senators into three parts, one-third to serve only two years, another third for four years, and the only the final third to serve the full six years. Thereafter, and continuing to the present day, a person selected to serve as a member of the Senate is chosen to occupy a seat in that body, a seat of a six-year duration. Thus, if a person resigns from the Senate, or dies, before his term expires, his successor is chosen or elected to fill the "vacancy" created by that resignation or death, not a full six-year term. Thus, the original version of Article I, Section 3, Clause 2 provided that "if Vacancies happen by Resignation, or otherwise," then a person would be chosen to "fill such Vacancies." In similar fashion, the Seventeenth Amendment provides that, "[w]hen vacancies happen in the representation of any State in the Senate" then there shall be

provided a special election to "fill such vacancies," not an election to fill a six-year term.

Neither the original Article 1, Section 3, Clause 2 nor the Seventeenth Amendment delimited the manner in which "vacancies" must occur. True, the original text specified "resignation," as one way in which such vacancies could occur, but coupling that way to the phrase "or otherwise" connotes that such vacancies could occur "in a different manner," not in "like" manner. The Seventeenth Amendment omitted altogether any reference to the manner in which vacancies might occur, indicating thereby that they could "happen" in any manner.

Senator Menendez would have this Court ignore this textual evidence, and follow the language used by the Supreme Court in Burton v. United States, 202 U.S. 344(1906) wherein the Court made the statement that "'[t]he seat into which [a person] was originally inducted as a Senator ... could only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers.'" Id., 202 U.S. at 369. *See* Menendez Pet., pp. 9-10.

Senator Menendez claims this statement to be the holding of the case. *See* Menendez Pet., p. 9. It was not. At issue in Burton was whether a Senator, convicted of a federal misdemeanor,

could void that conviction because the criminal judgment which disqualified him from holding federal office was "inconsistent with the constitutional rights of a Senator to hold his place for the full term for which he was elected, and operates of its own force to exclude a convicted Senator from the Senate, although that body alone has the power to expel its members." Burton, 202 U.S. at 369. To which claim, the Court answered that "the final judgment of conviction **did not operate, ipso facto, to vacate the seat** of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment." *Id.* (emphasis added). That answer alone was sufficient to dispose of the Senator's argument. Indeed, compounding its error, the Court further ruled that the criminal penalty attached to the misdemeanor conviction disqualifying the Senator from holding a federal office **did not even apply** to the office of United States Senator because the statutory disqualification "refer[ed] only to offices created, or existing under the direct authority of, the national government, as organized under the Constitution, **not to offices the appointments to which are made by the states....**" *Id.* (emphasis added).

In short, the Burton statement is not the "controlling precedent" Senator Menendez believes it to be. Menendez Pet., p.10. Rather, the statement is not only dicta, but ill-

considered dicta at that, totally inapplicable to the powers of the States with respect to the election and recall of members of the United States Senate. Additionally, having been decided in 1906, before the 1913 ratification of the Seventeenth Amendment, Burton is even further removed from the issue before this Court — whether that subsequent Amendment prohibits the people authorized by the United States Constitution to elect their Senators from creating a vacancy in the senatorial seat occupied by that person by means of a recall election, as provided by the constitution and laws of that state.

Without Burton on which to rely, the only argument left to the Senator is that "the right to recall was discussed but not included in the Seventeenth Amendment, just as at the time of the original Constitutional Convention." *See* Menendez Pet., p. 12. This argument from silence is based upon the absence of any express delegation of the power to recall in the Seventeenth Amendment. If accepted, such an argument would turn the Tenth Amendment upon its head, treating the power of the people as nonexistent unless delegated, rather than acknowledging that it is the United States government that has only those powers that are enumerated, whereas the power of the people to constitute that government is inherent.

B. The Power of Recall Is Not Prohibited by the Article I, Section 5 Power of the Senate to Judge Senatorial Elections and to Punish or Expel One of Its Members.

As the Supreme Court recalled in Powell v. McCormick, Alexander Hamilton, speaking before the New York ratifying convention, emphasized:

> [T]he true principle of a republic is, that **the people should choose whom they please to govern them.** Representation is imperfect in proportion as the current popular favor is checked. This great source of free government, **popular election**, should be perfectly pure, and the most **unbounded liberty allowed**. [*Id.*, 395 U.S. at 540-41 (emphasis added).]

Based upon this premise, the Powell Court ruled that the power of the United States House of Representatives to exclude a person duly elected by the people from membership in the House was limited by Article I, Section 5, Clause 1 to judging **only** whether the person met the three "qualifications" required of House members by Article I, Section 2, Clause 2. *Id.*, 395 U.S. at 548. Otherwise, the Court observed, the House could thwart the will of the people "as much by limiting whom the people can select as by limiting the franchise itself." *Id.*, 395 U.S. at 547. While the Powell ruling concerned the power of the House, it is equally applicable to the power of the Senate, in that the Seventeenth Amendment established the popular election of Senators, specifying — as does Article I, Section 2, Clause 1 for the House — that the "electors in each State shall have the qualifications

requisite for the most numerous branch of the State legislatures."

Remarkably, Senator Menendez would have this Court rule that the powers conferred upon the House and Senate to "judge ... the elections, returns and qualifications of its own members" would limit the power of the people to elect "whom they please to govern them" by denying to the people any power to recall an elected member of Congress. *See* Menendez Pet., pp. 8, 10. Contrary to Powell, Senator Menendez would read Article I, Section 5, Clause 1 as a limit on the power of the people, instead of a restriction on the powers of Congress. As Justice Story observed, however, the power to judge elections, returns and qualifications was vested in each house of Congress "to **preserve** the rights, and **sustain** the **free choice** of its **constituents**," not to undermine them. *See* 1 Story's Commentaries, § 833, pp. 604-05 (emphasis added).

The only authority that the Senator could muster in support of his convoluted argument is an unpublished opinion of an Idaho state trial court handed down in 1967, two years **before** Powell was decided. *See* Menendez Pet., p. 11 and Appendix, pp. 46a-50a.

Not only did the Idaho judge not have the benefit of the Powell opinion, his reasoning was based upon the faulty premise that since "[t]he states ... have not been given [the recall]

power by the Federal Constitution," it "would be a violation of ... the state-federal relationship as promulgated by the United States Constitution." *See* Menendez Pet., Appendix 47a. According to the Tenth Amendment, however, it is incumbent upon federal authorities to identify an affirmative delegation of power to the federal government; otherwise, the power is "reserved" to the States or to the People. The Idaho judge, thus, had no basis for inferring from the **absence of an express grant** of recall power to the States, a **prohibition** of such power.

Senator Menendez not only embraced the Idaho judge's mistaken understanding of the nature of America's federalist system, but the Senator has gone one step further arguing that the Constitution contains an "actual[] express grant" of the recall power "to the U.S. Senate," and hence "this power could not be reserved to the states." *See* Menendez Pet., p. 9. It is impossible to tell from the Menendez petition just where this power has been delegated, there being no express reference whatsoever to "recall" elections in the Constitution.

It appears that the Senator is relying upon the express delegation of power to the Senate to "expel a Member," as provided for in Article I, Section 5, clause 2. *See* Menendez Pet., pp. 8-9. The power to expel, however, has never been linked to the power to recall; rather, it has always been

associated with the power of a deliberative body to discipline its members in order to protect and maintain the dignity and integrity of that body. *See* W. Rawle, A View of the Constitution of the United States (2d. Ed. 1829), reprinted in The Founders' Constitution, Item 20, p. 313. *See also* 1 Story's Commentaries, § 838, p. 607-09.

In Powell v. McCormick, lawyers for the House of Representatives contended otherwise, claiming "that the House may expel a member for any reason whatsoever." *Id.*, 395 U.S. at 507. As the court documented, however, the House rules manual indicated that the power was limited to "misconduct," and even then, the power did not extend to misconduct "alleged to have been committed previous to the time when he was elected a Member." *Id.*, 395 U.S. at 508-10. A review of the debates at the constitutional convention led the Powell Court to conclude that neither the power of the House to exclude, or the power to expel, should be construed to authorize the House to act at will. Otherwise, "the legislature would have power to usurp the 'indisputable right [of the people] to return whom they thought proper' to the legislature." *Id.*, 395 U.S. at 535.

The power to recall Senator Menendez, if exercised, would have no such adverse effect on the power of the People. In a recall election, the people may return Senator Menendez to fill

out the rest of his six-year term. Thus, the power to recall, unlike the power of the Senate to expel, is not subject to any limitations, but may be exercised for any reason, or no reason at all.

C. The Power to Recall Is Not Subordinate to the Power of Congress to Make Laws Governing the Times and Manner of Holding Elections.

Although Senator Menendez did not specifically rely on the Article I, Section 4 grant of power to Congress to "make" its own regulations governing the "time" and "manner" of the election of United States Senators, or to "alter" any such state regulations, the court below suggested that, pursuant to this grant of power, "Congress can preempt the subject." *See* Menendez Pet., Appendix, p. 35a. In support of its suggestion, the court cited 2 U.S.C. section 1.

The code section cited by the court only prescribes the time for the election of a Senator on the occasion of the "expiration of the term for which any Senator was elected." And for good reason. The Seventeenth Amendment vests in the States' "executive authorit[ies]" and "legislatures" the power to provide for the elections of Senators to fill a vacancy, such as would occur if a Senator should be recalled. Indeed, the Amendment specifically confers upon state authorities to determine the "manner" in which such vacancies are to be filled, either by the

issuance of "writs of election" by the State's executive authority, or by temporary appointment by that authority, if authorized, and as directed, by the state legislature. *See*, *e.g.*, "Replacing Senator Kennedy," New York Times Editorial (Aug. 24, 2009).[4]

Unlike the general delegation of power to the States in Article I, Section 4 to set the time, place and manner of elections of members of Congress, subject to the power of Congress to alter those state regulations, the delegation of power to set the time, place and manner of an election filling in a vacancy in the Senate is very precise, leaving no constitutional space for Congress to occupy. Thus, contrary to the speculation of the court below, Congress could not preempt the application of a state recall law to a member of the United States Senate.

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[4] http://www.nytimes.com/2009/08/25/opinion/25tue2.html?_r=1.

III. STATE-MANDATED RECALL IS NOT FORECLOSED BY U.S. TERM LIMITS, INC. V. THORNTON.

Senator Menendez expansively characterizes U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) a "controlling decision[] of the U.S. Supreme Court (Pet., p. 9), and "controlling precedent" (Pet., p. 10) that should govern resolution of the instant case. However, Senator Mendenez leaves largely to the imagination how and why the holding in U.S. Term Limits denying to **a state** the right to impose supplemental qualifications for service in Congress should apply to deny the right of **the people** to recall a sitting Senator and choose a new Senator who they believe will better represent their interests.

Indeed, Senator Menendez never really attempts to characterize the recall power as a "qualification" for service in the Senate under Article I, § 3, cl. 3 of the U.S. Constitution. He never analyzes whether the principle undergirding the holding in U.S. Term Limits applies here. Indeed, the only aspect of the U.S. Term Limits case specifically referenced by Senator Menendez is Justice Stevens' statement that the "Tenth Amendment provides no basis on which the **States** could act in [an] area [where] they possessed **no powers to reserve** at the time the Constitution was adopted.... Id. at 805 (emphasis added). Assuming *arguendo*, that Justice Stevens' statement about the reserved powers of the

states is correct, it is highly significant that in this portion of the opinion relied on by Senator Menendez, Justice Stevens made no comment whatsoever about the reserved power of **the People**, and the logic of Justice Stevens' statement about the reserved power of the states does not automatically transfer over *ipse dixit* to an analysis of the reserved power of the People.[5] Indeed, later in his opinion, Justice Stevens made clear "that the right to choose representatives belongs not to the **States**, but to the **people**." U.S. Term Limits, at 820-21 (emphasis added). While Justice Stevens may have been addressing the electoral aspect of "the power to choose," it is not a far step from the recall power at issue in this case.

Lastly, Senator Mendendez' Petition wholly ignored the reasons which the Appellate Division stated for its belief that the U.S. Term Limits decision did not "address[] the issue before [it] or preclude[] recall under the Seventeenth Amendment."

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[5] States may have possessed no powers to regulate election to federal offices prior to their creation by the Constitution, but the same could not be said about the People. When the Seventeenth amendment required that Senators be "elected by the people" it vested electoral power in those Americans who inherently possessed, and exercised, the power to constitute their new federal government. (In this way, the Tenth Amendment actually provides more robust protection to the reserved powers of the people than to the reserved powers of a state which was the issue being addressed by Justice Stevens.) *See* discussion, *supra*, at xx.

Menendez Pet., 37a. The Appellate Division noted that the U.S. Term Limits "opinion repeated and emphasized its precedent that the Constitution was designed so that 'the people should choose whom they please to govern them.'" Id. (citations omitted). Indeed, this constitutional principle was the very bedrock on which U.S. Term Limits was decided. From the beginning of his opinion, immediately after his recitation of the relevant Constitutional texts and a brief statement of the case below, Justice Stevens explained that his decision was predicated on:

> the "fundamental principle of our **representative democracy**," embodied in the Constitution, that "the people should **choose** whom they please to govern them...." [U.S. Term Limits, at 783 (emphasis added).]

Unlike Senator Menendez, the Appellate Division well understood that if the reasons for the rule do not apply, so also should not the rule. The Supreme Court's decision in U.S. Term Limits presents no impediment whatsoever to the certification of the recall effort by the Secretary of State.

CONCLUSION

For the reasons stated herein, the Secretary of State should be directed to certify the recall effort below, and thereby vindicate the right of the people to conduct a recall election with respect to U.S. Senator Robert Menendez.

Respectfully submitted,

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